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INTERESTS OF AMICUS CURIAE[1]

The American Counseling Association ("ACA"), with approximately sixty thousand members, is the largest non-profit organization of professional counselors[2] in the United States. Professional counselors serve in private practice, community mental health centers, mental health agencies, schools and universities, hospitals, rehabilitation facilities, business and industry, correctional institutions, and religious organizations. The ACA is dedicated to the growth and enhancement of the counseling profession, and its mission is to promote public confidence and trust in the counseling profession.

Confidentiality between psychotherapist and client is essential to an effective therapeutic relationship. Many of ACA's members provide mental health services, including psychotherapy. The ACA has promulgated a Code of Ethics and Standards of Practice, which imposes a duty of confidentiality on all of its counseling members.[3] The ACA supports recognition of a psychotherapist-client privilege applicable to mental health care providers, including

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[1] Counsel for petitioner and counsel for respondents have consented to the filing of this brief. Written consent is on file with the Clerk.

[2] Professional members of the ACA must hold a master's degree or doctorate in counseling or a closely related field. The degree must be from an appropriately accredited college or university.

[3] The ACA's Code of Ethics (section A.3.a.) states that clients have the right to expect confidentiality in the counseling relationship and to be provided with an explanation of its limitations. Section B.1.a. requires counselors to respect their clients' right to privacy and avoid illegal and unwarranted disclosures of confidential information. American Counseling Association, *Code of Ethics and Standards of Practice* (July 1, 1995).

counselors and social workers. Failure to recognize such a privilege could lead to the disruption of psychotherapeutic treatment rendered by ACA members to their clients by forcing the therapist to violate his or her duty to maintain confidentiality, and by violating clients' reasonable expectations that confidentiality will be maintained. The ACA can assist the Court in resolving the questions raised in the writ of certiorari by providing insight into the need for confidentiality in counseling relationships and by demonstrating that the need to promote confidentiality extends to all professional providers of mental health care.

SUMMARY OF ARGUMENT

The Court should affirm the existence of a qualified psychotherapist-client privilege.[4] Congress delegated the power to recognize new privileges to federal courts under Rule 501 of the Federal Rules of Evidence. The justifications for a psychotherapist-client privilege are compelling. Recognition of the privilege protects the confidentiality of the psychotherapist-client relationship. Confidentiality is essential to encourage people who need psychotherapy to obtain treatment, and also to make that treatment effective by encouraging full cooperation with the therapist. In one form or another, the Congress, all fifty

[4] As used in this brief, psychotherapy refers to the treatment of mental or emotional disorders by verbal communication between a mental health care provider and a client. Psychotherapy is defined as "[t]he treatment of mental and emotional disorders through the use of psychological techniques designed to encourage communication of conflicts and insight into problems, with the goal being personality growth and behavior modification." *The American Heritage Dictionary of the English Language* 1463 (3d ed. 1992).

states, and most commentators have acknowledged that the benefits of a psychotherapist-client privilege outweigh any disadvantage due to evidence that the privilege may render unavailable.

A psychotherapist-client privilege protects only confidential communications, similar to the protection provided by the long-standing attorney-client and marital communications privileges. Because psychotherapy is a relatively new profession, the lack of a psychotherapist-client privilege at common law cannot foreclose its recognition in this case. The evidence protected from disclosure by a psychotherapist-client privilege will usually be available from other sources. Such a privilege protects only communications between the psychotherapist and client. In a civil case, this privilege does not permit a client to refuse to divulge any relevant facts on the witness stand, even if those facts occasioned the communications with the psychotherapist. Thus, application of the privilege often will put the adversary in no worse position than if the communications with the psychotherapist had never occurred. Application of the privilege is assessed on a case-by-case basis, allowing courts to reject the privilege when loss of evidence will cause extreme hardship to a party.

The Seventh Circuit's decision to protect the confidential communications between Officer Marylu Redmond and her psychotherapist is appropriately narrow. The court held that the relevant factors weigh in favor of recognizing a qualified psychotherapist-client privilege, and that the administration of justice is not harmed by application of the privilege to this case. Contrary to petitioner's suggestion, the Seventh Circuit did not adopt a sweeping privilege indiscriminately

protecting all communications between psychotherapist and client. Recognizing that Rule 501 requires case-by-case analysis, the court made its decision in the context of the specific facts before it.

The psychotherapist-client privilege is not limited to psychiatrists and psychologists; it extends to other professional providers of psychotherapy. Social workers and professional mental health counselors who practice in this field provide much of the mental health treatment in this country. Many clients seek the services of social workers and mental health counselors because their access to psychiatrists or psychologists is limited. The need for confidentiality characterizes all psychotherapeutic relationships. Forty-one states have recognized that confidential communications with a social worker should be privileged, and thirty-four recognize a privilege for communications with a professional mental health counselor. While the outer boundaries of the psychotherapist-client privilege are not before the Court, the privilege should include all professional sources of psychotherapy, such as the services provided by mental health counselors, and the licensed clinical social worker at issue in this case.

ARGUMENT

A. Congress Gave Courts the Power to Recognize Privileges Beyond Those in Existence at Common Law.

By enacting Federal Rule of Evidence 501, Congress "manifested an affirmative intention not to freeze the law of privilege . . . and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980). Under

Rule 501, the privilege of a witness is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This language is derived from this Court's opinion in *Funk v. United States*, 290 U.S. 371, 383 (1933), which noted that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."

Recognition of valid, justifiable privileges is in keeping with the purpose of Rule 501 and the Federal Rules of Evidence. Petitioner asserts that this Court's "purposeful unwillingness to create evidentiary privileges is consistent with the history of Rule 501 and with the policies of the Federal Rules of Evidence." Pet'r Br. at 14. Petitioner would read Rule 501 out of the rules of evidence. It is one thing to exercise caution before fashioning a privilege that will result in the exclusion of evidence, *see University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990); it is quite another to construe Rule 501 so narrowly as to render it meaningless. To the contrary, Congress carefully chose the language of Rule 501 "to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis." *United States v. Gillock*, 445 U.S. 360, 367 (1980).

Article V of the Proposed Federal Rules of Evidence originally contained an exclusive list of nine evidentiary privileges; Congress rejected that rigid approach, and adopted Rule 501 instead. S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7052-53. Rule 501 was adopted in anticipation that "privileges . . . [would] continue to be developed by the courts of the United States." H.R. Rep. No. 93-650, 93d

Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7082. Congress intended, through Rule 501, to authorize the courts to develop additional rules of privilege as the need arose. 120 Cong. Rec. H12253 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7110; *see also Trammel*, 445 U.S. at 47 n.8 (through Rule 501, Congress encouraged the development of privilege law on a case-by-case basis). Petitioner suggests that the history of Rule 501 requires rejection of any privilege not derived from the common law. Pet'r Br. at 19-20 n.28. The opposite is true: Congress made clear through Rule 501 that privileges should not be petrified in their common law state. *See* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511 (1994) (text, context, and legislative history of Rule 501 demonstrate that a restrictive interpretation of Rule 501 is flawed).

The Second and Sixth Circuits, in addition to the Seventh Circuit in the case under review, have acknowledged the courts' ability to recognize a new psychotherapist-client privilege under Rule 501. *Jaffee v. Redmond*, 51 F.3d 1346, 1354-55 (7th Cir.), *cert. granted*, 116 S. Ct. 334 (1995); *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983). These courts accepted a psychotherapist-client privilege only after carefully analyzing the costs and benefits of such a privilege, and expressly noting the qualified nature of the privilege. *Jaffee*, 51 F.3d at 1355-57; *Doe*, 964 F.2d at 1328; *Zuniga*, 714 F.2d at 639. The Fifth, Ninth, and Eleventh Circuits, which refused to recognize a federal

psychotherapist-client privilege under Rule 501, did so because of those courts' mistaken belief that Rule 501 limits available privileges to those in existence at common law. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.), *cert. denied sub nom. Doe v. United States*, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Lindstrom*, 698 F.2d 1154, 1167 n.9 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976). Some circuit courts have rejected the psychotherapist-client privilege only in limited circumstances. *See, e.g., United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir.) (declining to recognize psychotherapist-client privilege in a criminal child sexual abuse case), *cert. denied*, 115 S. Ct. 176 (1994).

To support the argument against recognition of a new privilege, petitioner cites numerous rules of evidence allowing for the liberal admission of evidence in federal courts. Pet'r Br. at 17-19. Petitioner states that the permissive scheme of the Federal Rules of Evidence is "flatly at odds with respondents' request that the Court create a new rule to exclude relevant evidence." *Id.* at 19. Rule 501 grants federal courts the power to identify privileges, however, indicating that in the scheme of the federal rules, the need for a specific privilege can outweigh any general presumption for admission of all relevant evidence. Rule 501 represents Congress' recognition of the tension between the competing policies of protecting confidential relationships and promoting access to evidence,

and its recognition of the courts' power to reconcile these policies.[5]

No psychotherapist-client privilege existed at common law. *See In re Grand Jury Proceedings*, 867 F.2d at 565. Recognition of psychotherapy as a mode of treatment, however, did not develop until the modern era.[6] The substantial arguments in favor of a privilege protecting the psychotherapeutic relationship should not be rejected merely because the treatment is a modern one. *Funk*, 290 U.S. at

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[5] Similarly, petitioner's argument that the district court's ability to control discovery through protective orders is an adequate substitute for a privilege must fail. Pet'r Br. at 41. A privilege is designed to prevent use of the protected information in the litigation in a manner adverse to the interest of the holder of the privilege. Protective orders limit access to confidential information; they do not prohibit adverse use of the information in litigation. *See, e.g.*, Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893, 923-24 (1982) (study indicating that before enactment of psychotherapist-patient privilege statute in Texas, Texas judges admitted into evidence relevant confidential communications between patient and therapist). In the attorney-client context, for example, a protective order might prevent the public's access to attorney-client communications, but the attorney-client relationship would still be damaged by the use of those communications against the client in litigation.

[6] *See* Franklin D. Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. Va. L. Rev. 1, 37 (1990) (first psychotherapist-client privilege in the United States was passed in Kentucky in 1948); Lauren Messersmith, Comment, *Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501*, 23 Washburn L.J. 706, 711 (1984) (noting increasing popularity, respect, and status for the psychiatric profession); *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1530 (1985) (citing Louisell, *The Psychologist in Today's Legal World* (pt. 2), 41 Minn. L. Rev. 731, 731-35 (1957)).

382-83 ("flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law"). The arguments that support a psychotherapist-client privilege are strikingly similar to those that support well-established common law privileges, such as the attorney-client privilege and the marital communications privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege is intended to promote full and frank communication between attorney and client); *Trammel*, 445 U.S. at 51 (attorney-client and marital communications privileges are designed to protect confidential communications).

B. The Court Should Recognize a Qualified Psychotherapist-Client Privilege.

To determine whether to recognize an evidentiary privilege, a court must first inquire whether the privilege promotes sufficiently important interests to outweigh the need for evidence at trial. *Trammel*, 445 U.S. at 51. The scope of a qualified privilege, once identified, is determined on a case-by-case basis. *Upjohn*, 449 U.S. at 396. Here, the Seventh Circuit carefully weighed the costs and benefits, generally and in this particular case, before recognizing a qualified psychotherapist-client privilege. *Jaffee*, 51 F.3d at 1355-57. After analyzing the appropriate factors, the court determined that such a privilege existed, and protected the confidential communications at issue. *Id.* at 1357-58. The court expressly declined to address application of the privilege in factual scenarios not before it. *Id.* at 1357. The Seventh Circuit did not create a blanket privilege, as petitioner contends. Pet'r Br. at 11. The court's opinion correctly concludes that the balance tips in favor of

recognizing a qualified psychotherapist-client privilege, that application of the privilege must be on a case-by-case basis, and finally, on the facts of this case, that the benefits of protecting confidentiality outweigh the need for evidence. *Jaffee*, 51 F.3d at 1356-58.

1. The substantial benefits of a psychotherapist-client privilege are widely accepted and support recognition of the privilege.

Congress has expressed approval for a psychotherapist-client privilege, S. Rep. No. 93-1277, *reprinted in* 1974 U.S.C.C.A.N. at 7059, and the legislature of every state has enacted some form of privilege to protect confidential communications with a psychotherapist. *Jaffee*, 51 F.3d at 1356. In addition, several Courts of Appeal have recognized a qualified privilege after balancing the competing interests. *Id.* at 1357; *Doe*, 964 F.2d at 1328-29; *Zuniga*, 714 F.2d at 638-39. Commentators almost uniformly favor some form of the privilege.[7] Reason and experience thus warrant explicit recognition of a psychotherapist-client privilege by this Court.

The proposed Federal Rules of Evidence, submitted to Congress for approval in 1973, included an exclusive list of nine privileges set out in Article V. *Proposed Fed. R. Evid.*, 56 F.R.D. 183, 230-61 (1973). Proposed Rule 504 defined a psychotherapist-client privilege. *Id.* at 240-41.

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[7] *See, e.g.*, Cleckley, 93 W. Va. L. Rev. at 51; Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 620-21 (1980); Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 Ky. L.J. 473, 556-57 (1986).

Congress did not pass Rule 504, or any other specific privilege rule in Article V. S. Rep. No. 93-1277, *reprinted in* 1974 U.S.C.C.A.N. at 7053. When adopting Rule 501 in place of a roster of specific privileges, Congress noted that it was rejecting Article V's restrictive approach of a list, not the content of the particular privileges themselves that the list contained:

> [I]n approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . [privilege] contained in the [proposed] rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Id. at 7059. Accordingly, the legislative history of the Federal Rules of Evidence supports the existence of a psychotherapist-client privilege.

State privilege law is relevant when considering the existence of a federal privilege. *Gillock*, 445 U.S. at 368 n.8; *see also Trammel*, 445 U.S. at 49-50 (taking note of state law trend to limit privilege against adverse spousal testimony because regulation of marriage is an area of state concern). All fifty states have enacted statutes providing some form of privilege protecting psychotherapist-client relationships. *See Jaffee*, 51 F.3d at 1356. Petitioners make much of the fact that these state laws are not uniform and contain various exceptions to the privilege. Pet'r Br. at 31-38. By stressing variation among the individual trees, petitioner ignores the nationwide forest of state privilege

statutes: *all* state legislatures have enacted some form of the privilege because they determined that the benefits associated with the psychotherapist-client privilege generally outweigh the costs of excluding otherwise admissible evidence.

In *Trammel v. United States*, the Court noted that common law testimonial privileges "are rooted in the imperative need for confidence and trust." 445 U.S. at 51. A privilege may protect confidences in order to preserve a vital professional relationship, like the attorney-client privilege, or may simply be recognized by the courts out of respect of certain spheres of privacy, as in the marital communications privilege. *Id*. *Both* of these justifications for testimonial privileges apply to the psychotherapist-client relationship. The Court curtailed the privilege against adverse spousal testimony in *Trammel* because the privilege was not limited to confidential communications and its justification was archaic. *Id*. at 51-52. The opposite is true of the psychotherapist-client privilege, which protects private communications between a professional and a client in a therapeutic relationship whose importance continues to grow over time.

The attorney-client privilege promotes frank disclosure by clients to their attorney, because an attorney must be fully informed to provide competent legal advice. *Upjohn*, 449 U.S. at 389. Similarly, the psychotherapist-client privilege rests on the principle that clients should be able freely to reveal private information to mental health professionals without fear of later disclosure in court. Successful psychotherapy hinges on clients' trust and confidence in their psychotherapist. Bruce R. Hopkins & Barbara S. Anderson, *The Counselor and the Law* 9 (3d ed. 1990).

The marital communications privilege protects marital confidences that are "so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfle v. United States*, 291 U.S. 7, 14 (1934). The private and confidential nature of communications between psychotherapist and client parallels the intimate communications between spouses. Just as this Court is willing to protect the privacy of the marital relationship, the Court should recognize a psychotherapist-client privilege to protect the confidential communications that occur in such relationships. There is nothing more private than a person's dreams, fantasies, thoughts and fears. *See* Smith, 75 Ky. L. J. at 478.

Moreover, a psychotherapist-client privilege is essential to the effective functioning of psychotherapeutic treatment. First, common sense supports the proposition that in the absence of a privilege to support clients' perception of confidentiality,[8] a significant number of clients would be

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[8] Some empirical studies suggest that clients rely on a professional's ethical duty to maintain confidentiality rather than on a privilege. *See, e.g.*, Shuman & Weiner, 60 N.C.L. Rev. at 920 (patient survey indicating that ninety-six percent of patients rely more heavily on confidentiality duty than privilege). However, it is not clear that patients understand the difference between the two. *See* Daniel W. Shuman et al., *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J. Law & Psych. 393, 416 (1986) (patients involved in study may have been confused about distinction between therapists' ethical and legal obligations); Paul S. Appelbaum et al., *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psych. Law 109, 115 (1984) (patients are "overwhelmingly confident" that their therapists will protect their privacy, so studies demonstrating that patients do not consider privileges

reluctant to seek treatment. *See, e.g.*, Appelbaum et al., 12 Bull. Am. Acad. Psych. Law at 115. Much of society still stigmatizes those who have mental or emotional problems. *See* Kathleen L. Cerveny & Marian J. Kent, *Recent Decision: Evidence Law - The Psychotherapist-Patient Privilege in Federal Courts*, 59 Notre Dame L. Rev. 791, 798 (1984) (clients have a legitimate interest in protecting information because of the social stigma attached to treatment); Kathryn M. Denkowski & George C. Denkowski, *Client-Counselor Confidentiality: An Update of Rationale, Legal Status, and Implications*, Personnel & Guidance J. 371, 372 (Feb. 1982) (confidentiality protects clients from the social stigma associated with therapy). Because healthy individuals are more productive and stable, a psychotherapist-client privilege that encourages troubled persons to seek therapy promotes the public good.[9]

Second, the benefit obtained by encouraging clients to consult with professionals and fully disclose their problems does not evaporate even if some clients might continue to seek therapy without a privilege. Once a person seeks psychotherapy, confidentiality is essential for effective

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before confiding in their therapists do not imply that patients would engage in therapy if it were clear confidentiality could not be guaranteed). The Canadian study indicated that revelations having legal implications were most likely to be affected by the absence of a privilege. Shuman et al., 9 Int'l J. Law & Psych. at 414. Thus, the privilege may most effectively encourage disclosure by those most likely to need the protection of the privilege.

[9] An estimated twenty percent of all adults suffer at least one mental disorder. Ron Lechnyr, *The Cost Savings of Mental Health Services*, EAP Digest 22, 22 (Nov./Dec. 1993).

treatment. *See* Leon VandeCreek et al., *Client Anticipations and Preferences for Confidentiality of Records*, 34 J. Couns. Psych. 62, 62 (1987) ("[c]lients have reported that fears of loss of confidentiality could be devastating to their treatment"). Therapy involves disclosure of sensitive matters a person normally is reluctant to discuss, and clients will resist revelation of personal problems unless they trust their psychotherapist. Hopkins & Anderson, *The Counselor and The Law* at 9. A psychotherapist-client privilege fosters such trust and thereby furthers treatment. *See* David Nowell & Jean Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psych.: Research & Prac. 367, 369 (1993) (reporting results of a study that suggested that client informed of the limits of confidentiality may be less willing to reveal extreme thoughts). A substantial benefit thus is gained if the privilege furthers disclosure in psychotherapy, even if clients would seek therapy with or without the privilege. As this Court noted in the context of the attorney-client privilege, even if a client has a strong incentive to confide, "the common law has recognized the value of [a] privilege in *further* facilitating communications." *Upjohn*, 449 U.S. at 393 n.2 (emphasis added); *see* Shuman & Weiner, 60 N.C.L. Rev. at 926 (noting that the results of a survey of therapy clients revealed that for some clients the quality of treatment would be furthered by a privilege statute). Without that revelation, it is the client, not the trained therapist, who is choosing what information is important. Saltzburg, 66 Va. L. Rev. at 620-21.

Therapy often focuses on a clients' thoughts, not actions. Clients must be free to explore thoughts and feelings without

the fear that by admitting them the disclosures will later be used against them.

> Clients who seek the assistance of a mental health professional . . . reveal private information about their thoughts, feelings, fantasies, and conduct. This disclosure of sensitive, sometimes embarrassing or shameful, personal information makes clients vulnerable to being harmed if unauthorized third parties gain access to such information. Clients assume or seek assurances that sensitive information will be a confidential communication to their [mental health provider], and unless they can trust their therapist and rely on confidentiality, they are unlikely to cooperate fully in their therapy.

Michele Smith-Bell & William J. Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships*, 64 Am. J. Orthopsych. 180, 180 (Apr. 1994). Clients who are confident that their disclosures will not be revealed to others will better be able to reveal such thoughts and be treated effectively. *See* Nowell & Spruill, 24 Prof. Psych: Research & Prac. at 369 (study demonstrated that potential therapy clients informed of limits of confidentiality are more reluctant to self-disclose).

A privilege may also strengthen the psychotherapist-client relationship by preventing harm to a client involved in litigation. Revelations of confidential communications in court may cause psychological harm to the client. *See* Shuman et al., 9 Int'l J. Law & Psych. at 417 (concluding that "several types of damage did occur to some of the patients whose therapists testified about them"). In addition,

compelling a mental health care provider to testify in court would likely devastate an ongoing psychotherapist-client relationship. *See* Appelbaum et al., 12 Bull. Am. Acad. Psych. Law at 114 (survey indicating that seventy-two percent of clients believe that unauthorized disclosure of communications might adversely affect an ongoing relationship); VandeCreek et al., 34 J. Couns. Psych. at 66 (survey indicated that clients were likely to withhold revelations, end treatment, or sue if psychotherapist breached confidentiality).

These considerations all apply to Officer Redmond's therapeutic relationship on the facts of this case. In the course of her duties, Officer Redmond was involved in a violent and traumatic episode, with inevitable consequences for her mental and emotional state.[10] Recognition of a psychotherapist-client privilege will encourage those in Officer Redmond's position to obtain the help they need through psychotherapy. Police officers are often subject to

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[10] One description of a police officer's reaction to use of deadly force reads:

> The immediate response may include disbelief, shock, denial of feelings, and confusion. . . . As the first week passes, considerable self-questioning takes place. . . . Depression may develop and may be accompanied by angry or guilty feelings. The officer may spend a great deal of time replaying the incident and looking for alternative actions. . . . [T]he posttraumatic stress syndrome can continue for years, resulting in alcoholism, family disruption, impotence, depression, and general inability to deal with stress.

Wayne Anderson & Barbara Bauer, *Law Enforcement Officers: The Consequences of Exposure to Violence*, 65 J. Couns. & Dev. 381, 383 (Mar. 1987).

civil suits. *See, e.g.*, Lant B. Davis et al., Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781 (1979). The absence of a psychotherapist-client privilege protecting police officers' revelations to their psychotherapists would inevitably discourage them from seeking psychotherapy for matters troubling them. If the officers did seek counseling, fear that their candor may come back to haunt them in a civil suit may prevent them from being open and forthright. *See* Anderson & Bauer, 65 J. Couns. & Dev. at 383.

2. The costs associated with a psychotherapist-client privilege are often minimal, and courts can adequately consider them on a case-by-case basis.

As this Court noted in the context of the attorney-client privilege, "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395. In most civil cases, a client can be compelled to take the stand and testify as to any relevant facts, regardless of whether those facts were also discussed during a psychotherapeutic relationship. In addition, evidence lost because of a privilege will often be available from sources other than the client. *See, e.g.*, Shuman et al., 9 Int'l J. Law & Psych. at 417 (fifty percent of judges questioned in three surveys thought that information covered by a psychotherapist-client privilege was available from nonconfidential sources). In cases in which the evidence sought to be protected by a privilege is both crucial and unavailable elsewhere, the qualified privilege may be outweighed by the interests of justice. *See, e.g.*, *Burtrum*, 17 F.3d at 1302 (declining to recognize a

psychotherapist-client privilege in a criminal child sexual abuse case).

Some evidence is available only because of the existence of the privilege. A client's belief that disclosures in psychotherapy will be kept confidential no doubt encourages some clients to reveal their thoughts and confidences. If those revelations occur only because of the confidential nature of the relationship and the privilege serves to protect that confidentiality, then loss of that evidence cannot be said to be a cost of the privilege. *Developments in the Law*, 98 Harv. L. Rev. at 1477; *see also Upjohn*, 449 U.S. at 395 (recognizing that application of the attorney-client privilege ordinarily puts an adversary in "no worse position than if the communications had never taken place"). Also, as petitioner notes, only a small number of clients become litigants in federal court. Pet'r Br. at 30. While the privilege will benefit many clients by fostering the clients' trust in their counselors' duty of confidentiality, Nowell & Spruill, 24 Prof. Psych: Research & Prac. at 369, the actual cost in terms of lost evidence will be slight.

In addition, any evidence available from a therapy session often will be misleading or irrelevant in court. That evidence may consist of thoughts, desires, and even fantasies whose relationship to the factual record is tenuous, at best. As Professor Slovenko wrote:

> The crusade and the hullabaloo over privilege in civil or criminal cases . . . insinuates that the content of a psychotherapy session may be relevant or material in litigation. Out of a sense of pride a person may fear disclosure of the confidences he makes about his sexual

> life, his dependency, his insecurity, his struggle in interpersonal relations, all interspersed with fantasy. But these subjects have little or no significance in legal proceedings. The dialectic of one's right of privacy versus the danger that secrecy will allow truth to go undetected is not here the contest. . . . The sunlight advocated by Justice Brandeis would not come from disclosure of psychotherapy sessions, even if they were tape recorded.

Ralph Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 Cath. U. L. Rev. 649, 661-62 (1974).

In this case, the evidence from Officer Redmond's psychotherapy treatment that would be shielded from disclosure by a psychotherapist-client privilege is cumulative evidence that petitioner seeks to use for impeachment purposes only. Pet'r Br. at 21-25. The need for impeachment evidence does not outweigh the interests served by application of the psychotherapist-client privilege. If the impeachment evidence sought by petitioner in this case were sufficient to overcome the need for protection of confidences, then the exceptions would swallow not only this privilege, but *any* qualified privilege. Given the broad scope of potential impeachment evidence, any revelation to a psychotherapist would be fair game, and the privilege would exist in name only.

Petitioner seeks evidence regarding confidential disclosures made during psychotherapy sessions, hoping to establish that Officer Redmond's version of events on the day Ricky Allen was killed is inaccurate. Officer Redmond

testified at trial as to the events during the shooting. Pet'r Br. at 10. Traditional methods of cross-examination and impeachment, without the evidence from the psychotherapy sessions, are more than adequate tools to challenge her version of events. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (traditional means of challenging the accuracy of testimony are available to impeach previously hypnotized witnesses). Moreover, many people witnessed the shooting, some of whom took the stand and offered versions of the event quite different from Officer Redmond's description. Pet'r Br. at 3-5. Petitioner was not limited to impeachment through testimony of the deceased's relatives, but was able to call other police officers to the stand to dispute Officer Redmond's version of events. *Id.* at 5.

Petitioner argues that the need for evidence in a civil rights action under 42 U.S.C. § 1983 necessarily outweighs a defendant's interest in therapy. Pet'r Br. at 38-39. Nowhere in the Federal Rules of Evidence, however, is there a suggestion that impeachment evidence is more important or more relevant in a federal civil rights action than in other causes of action, or that the recognition of privileges depends on the particular cause of action asserted. *Cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (rejecting heightened pleading standard for sec. 1983 causes of action as contrary to the notice pleading requirement of Federal Rule of Civil Procedure 8(a)(2)). That section 1983 is a "uniquely federal remedy" is likewise irrelevant. Pet'r Br. at 38. Rule 501 provides for application of state privilege law when state law supplies the rule of decision. Therefore, application of federal privilege law will always arise in the context of a federal cause of action.

Petitioner attempts to analogize the situation in this case to cases rejecting testimony generated by hypnotism or memory refreshment, arguing that hiding the many psychotherapy sessions from the jury undermines the integrity of the factfinding process. Pet'r Br. at 22-23. Officer Redmond, however, engaged in therapy to help her recover from a traumatic event, not in an attempt better to recollect the shooting or to testify more persuasively about it. Cases dealing with actions undertaken deliberately to refresh a witnesses' testimony are simply not parallel to the facts of this case. Officer Redmond did not attend over fifty psychotherapy sessions because it would be "[a]n effective tactic in cross-examination." Pet'r Br. at 22; *see also Rock*, 483 U.S. at 56 (noting, when striking down application of an Arkansas rule against posthypnosis testimony, that the rule applied to any witness regardless of the reasons for the hypnosis).

C. The Justifications for a Psychotherapist-Client Privilege are not Limited to Psychiatrists and Psychologists.

The Seventh Circuit correctly held that the psychotherapist-client privilege is not limited to psychiatrists or psychologists, and that confidential communications with a licensed clinical social worker fall within the psychotherapist-client privilege. *Jaffee*, 51 F.3d at 1358 n.19. The arguments in support of a psychotherapist-client privilege apply to any professional relationship in which psychotherapy is provided, including Officer Redmond's treatment by the licensed social worker in this case. Petitioner relies on proposed Rule 504 to demonstrate a supposed Congressional intent to confine the protection of

the privilege to psychiatrists and psychologists. Pet'r Br. at 39-40. Congress, however, rejected Rule 504, and the legislative history of Rule 501, adopted in its stead, contradicts petitioner's argument.

Proposed Rule 504 would have limited the psychotherapist-client privilege to psychiatrists and psychologists. *Proposed Fed. R. Evid.*, 56 F.R.D. at 240-41. Some lower courts that have refused to recognize a psychotherapy privilege have done so based on proposed Rule 504's limitation. *See, e.g., Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474, 477 (N.D. Ind. 1989) (holding that the federal psychotherapist-client privilege should extend beyond the parameters of proposed Rule 504); *see also Dixon v. City of Lawton, Oklahoma*, 898 F.2d 1443, 1450 (10th Cir. 1990) (relying on proposed Rule 504 to find an exception to the psychotherapist-client privilege when client put his mental condition at issue in litigation). These courts, and petitioner's brief, ignore Congress's rejection of proposed Rule 504. *See Bob Jones University v. United States*, 461 U.S. 574, 600 (1983) (Congress' failure to pass legislation is ordinarily a poor indicator of legislative intent). In fact, the legislative history of proposed Rule 504 demonstrates that there was Congressional support for extension of the privilege beyond psychiatrists and psychologists. *Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the Comm. of the Judiciary*, 93d Cong., 1st Sess. 460-65 (1973) (questioning witnesses regarding social worker privilege).

No material difference exists between the psychotherapy provided by psychiatrists and psychologists, and that

provided by social workers and mental health counselors, that would justify excluding the latter and their clients from the protection of the privilege. *See Developments in the Law*, 98 Harv. L. Rev. at 1550 ("the services offered by other counselors constitute a subset of those offered by psychotherapists and are therefore indistinguishable from the services of psychotherapists"). Indeed, definitions of psychotherapy do not depend on the identity or credentials of the therapist; rather, psychotherapy is defined by the nature of the treatment rendered, and so should be the privilege.[11] Moreover, most states do not limit their psychotherapist-client privilege to psychiatrists and psychologists; the privileges extend to professional mental health counselors and social workers who also provide psychotherapy.[12]

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[11] Psychotherapy is defined as:

> treatment designed to produce a response by mental rather than by physical effects, including the use of suggestion, persuasion, re-education, reassurance, and support . . . .

Dorland's Illustrated Medical Dictionary 1284 (25th ed. 1974); *see also* note 3, *supra*, (citing *American Heritage Dictionary* definition of psychotherapy).

[12] Thirty-four states have established some form of privilege protecting communications between counselors and clients. Ala. Code § 34-8A-1; Ariz. Rev. Stat. Ann. § 32-3283; Ark. Code Ann. § 17-24-308; Colo. Rev. Stat. § 12-43-201; Del. Code Ann. tit. 24, § 3013; Fla. Stat. ch. 491.0147; Idaho Code § 54-3410; Ill. Rev. Stat. ch. 225, para. 107/75; Kan. Stat. Ann. § 65-5810; La. Code Evid. Ann. art. 510; Me. Rev. Stat. Ann. tit. 32, § 13862; Mass. Ann. Laws ch. 112, § 172; Mich. Stat. Ann. § 14.15(18117); Mo. Rev. Stat. § 337.540; Mont. Code Ann. § 37-23-301; Neb. Rev. Stat. § 27-504; N.H. Rev. Stat. Ann. § 330-A:19; N.J. Stat. § 45:8B-49; N.M. Stat. Ann. § 61-9A-27; N.C. Gen. Stat. § 8-53.8; N.D. Cent. Code § 43-47-09;

The need to protect the confidential communications between a psychotherapist and a client does not disappear simply because the provider's credentials differ. The problem for which the client seeks treatment and the function performed by the therapist are the same. What is essential for application of the privilege should be that the client seeks to protect confidential communications disclosed to a psychotherapist. Slovenko, 23 Cath. U. L. Rev. at 664. Application of the psychotherapist-client privilege based on the function performed by a mental health care provider conforms more closely to the purpose of the privilege than any arbitrary line drawing based on which diploma or license hangs on the provider's office wall.

Moreover, confining the psychotherapist-client privilege to psychiatrists and psychologists would limit the number of professionals providing the most confidential therapy. Social workers and mental health counselors who provide the same therapy would be less able to assure clients of confidentiality. Limiting the privilege exclusively to psychiatrists and psychologists would thus unfairly preserve the privilege only for those able to obtain access to psychiatrists or psychologists.

The therapist in this case was a clinical social worker with a master's degree and extensive training in her field.

Ohio Rev. Code Ann. § 2317.02; Okla. Stat. tit. 59, § 1910; Or. Rev. Stat. § 40.262; R.I. Gen. Laws §§ 5-63-17, 9-17-24; S.D. Codified Laws Ann. § 36-32-27; Tenn. Code Ann § 63-22-114; Tex. R. Civ. Ev. Rule 510; Utah Code Ann. § 58-60-114; Va. Code Ann. § 8.01-400.2; Wash. Rev. Code Ann. § 18.19.180; W. Va. Code § 30-31-13; Wis. Stat. § 905.04; Wyo. Stat. § 33-38-109. Forty-one states have created a social worker-client privilege. Pet'r Br. at 35.

Jaffee, 51 F.3d at 1350 n.3. The state of Illinois certified the therapist as an employee assistance counselor, 51 F.3d at 1350, and under Illinois law confidential communications between the therapist and her client were privileged. Ill. Rev. Stat. ch. 225, para. 20/16. In fact, as petitioner notes, only nine states fail to provide any protection whatsoever for communications to social workers. Pet'r Br. at 35. There simply are no persuasive arguments for denying the psychotherapist-client privilege to the relationship in this case.

CONCLUSION

For the reasons stated above, the American Counseling Association respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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